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Before The  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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In the Matter of )

Federal-State Joint Board on )  
Universal Service )

CC Docket No. 96-45

**REPLY COMMENTS OF THE**  
**COMMERCIAL INTERNET EXCHANGE ASSOCIATION**

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**REPLY COMMENTS OF THE  
COMMERCIAL INTERNET EXCHANGE ASSOCIATION**

The Commercial Internet eXchange Association ("CIX"), by its attorneys, hereby replies to the comments filed on the Recommended Decision<sup>1</sup> in the above-captioned docket. CIX urges the Commission to adopt rules for the provision of "advanced services" to schools and libraries that are *competitively neutral* for all Internet service providers ("ISPs"). The statutory mandate for "competitive neutrality" requires that facilities-based Internet access providers, such as the incumbent LECs, not receive a highly advantageous universal service subsidy to offer their services to schools and libraries, while all other providers are denied that same opportunity.

**Introduction and Summary**

In its initial comments, CIX supported several of the Joint Board's recommendations. First, CIX strongly supported the Joint Board's decision not to require ISPs to contribute directly to the universal service fund. *C.f.*, 47 U.S.C. § 254(d) ("telecommunications carriers" pay directly into universal service fund support). Second, CIX agreed that the Commission has statutory authority, pursuant to Section 254(h)(2), to provide competitively neutral universal service support for Internet access for schools and libraries. Finally, CIX supported the Joint

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<sup>1</sup> Recommended Decision, CC Dkt. No. 96-45, FCC 96J-3 (rel. Nov. 8, 1996) (hereinafter the "Recommended Decision").

Board decision to allow all ISPs, even those that are not facilities-based carriers, to be eligible for USF reimbursement. Competitive neutrality, as well as the public interest in maximizing service choices for schools and libraries, demand that all ISPs can compete in the market for schools and libraries customers.

CIX recognizes that there is a significant division among the commenters as to whether Internet access service, *per se*, should be subsidized by the universal service fund. On the one hand, Internet access discounts would significantly promote the laudable public efforts to get classrooms, schools and libraries on the Internet, to teach our children how to use the Information Age, and to bridge the gap between the information "haves" and "have nots." On the other hand, the Internet access market is now fully competitive and the introduction of regulatory subsidies could well result in unanticipated and detrimental effects on the competitive Internet access market. For these reasons, CIX believes that the Commission's paramount objective in addressing "advance service" discounts should be a regulatory scheme that preserves the competitive Internet access market.

As CIX sees it, the Commission could adopt either one of two alternatives to implement Section 254(h)(2), in light of the Joint Board's recommendation for Internet access service discounts. First, the Commission could adopt the Joint Board's recommendations. CIX believes that the Commission has ample statutory authority to do so, as long as it is implemented in a competitively neutral manner for all Internet access providers. Alternatively, the Commission could simply decide to subsidize the underlying telecommunications service connecting the school or library to the ISP, but not subsidize the Internet access service. This alternative, however, also requires that the Commission address issues of "competitive neutrality" in the Internet access market because some providers of telecommunications services are also ISPs, such as incumbent LECs with approved CEI plans to offer Internet access. Without further constraints on these facilities-based providers, the telecommunications discount will effectively exclude all other ISPs from the libraries and schools market.

## **Discussion**

### **I. "Competitive Neutrality" Requires that Any Internet Access Discount Subsidy Is Available To All Internet Service Providers**

As CIX explained in its initial comments, an Internet access discount program in which all Internet service providers are eligible to participate substantially promotes Congressional goals. First, a plan to allow participation by all ISPs, including those that are non-telecommunications providers, treats all providers in a competitively neutral manner. In addition, service flexibility for schools and libraries is maximized and overall costs to the universal service fund are controlled through the introduction of competitive pricing in the discount program. Many members of the education and libraries community strongly support the Joint Board's proposal for significantly discounted Internet access service. *See, e.g.*, Comments of Illinois State Library at 1-2; Comments of the Ohio Department of Education at 4; Comments of the Mississippi Council for Education Technology and the Mississippi Library Commission at 4. The ability to choose from among several competing Internet access providers was noted as a particularly advantageous aspect of the Recommended Decision for schools and libraries. As the Illinois State Library (at 2) pointed out, the FCC's rules "should enable schools and libraries to obtain services that are eligible for a discount through Internet service providers . . . as well as through telecommunications companies. Keeping a broad number of options should enable libraries to obtain services at more competitive prices, thereby decreasing the demand for universal service fund reimbursement."<sup>2</sup>

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<sup>2</sup> CIX concurs with America Online, Inc. that the Commission should only require schools to select the most "cost-effective" service provider, which may not be the lowest price provider in all cases. Schools should have flexibility in their decisions, and choose providers based on several factors including price (*i.e.*, speed and reliability of service, technical support) when deciding which provider is most "cost-effective."

The principal commenters opposed the Joint Board's recommendation for Internet access service discounts for schools and libraries are the incumbent LECs. *See, e.g.,* Comments of Pacific Telesis at 37-44; Comments of SWB Communications at 43-49; Comments of Ameritech at 18; Comments of NYNEX at 40; Comments of BellSouth at 20-23; Comments of ALLTEL at 5; Comments of GTE at 89-90. CIX recognizes that these parties raise significant issues, and the Commission may well decide that Internet access service subsidies would harmfully affect the Internet access market, contrary to the statutory mandate for "competitive neutrality."

Unfortunately, these incumbent LECs also contend that the Commission lacks authority to adopt the Joint Board's plan for Internet access discounts that would include eligibility for non-telecommunications carriers. As discussed in detail below, CIX disagrees with that statutory interpretation, and believes that if the Commission adopts Internet access discounts for schools and libraries that the "competitive neutrality" mandate requires that all ISPs are eligible under that program. Many of these incumbent LECs are also providers of Internet access services, and compete in the market with the much smaller non-facilities-based ISP providers. Thus, a Commission rule that permits those incumbent LECs to offer greatly discounted telecommunications as well as Internet access service would effectively exclude all other Internet access providers from the schools and libraries market. This result would completely frustrate the statutory mandate for "competitive neutrality."

***A. Section 254 Provides the Commission with Authority to Promote Internet Access Discounts for Schools and Libraries In A "Competitively Neutral" Manner***

The Commission has ample authority to adopt the Joint Board's recommendation for Internet access discounts to schools. Section 254(c)(3) defines "universal service" to include "advanced services" designated by the Commission pursuant to Section 254(h). Congress has mandated that the Section 254(h)(2) "advanced services" for schools and libraries go beyond the minimum "core" telecommunications services and include "access to advanced telecommunications and information services." 47 U.S.C. § 254(h)(2)(A). Further, the Joint

Board's recommendation that all providers of Internet access, including "information service" providers, should be eligible to participate in the discount program best comports with the statutory mandate for "competitive neutrality" in the Internet access market. While several incumbent LEC commenters argue for excluding ISP competitors from the schools and library market by regulatory fiat, these arguments misconstrue the plain meaning of the statute and the Commission's rulemaking authority under Section 254(h).

1. *Support for Section 254(h)(2) "Advanced Services" May Include Internet Access Service to Schools and Libraries*

Several parties claim that Internet access for schools and libraries cannot be designated by the Commission as a "universal service" because it does not meet the definition of a "telecommunications service." Comments of SBC Communications at 43; Comments of Ameritech at 18; Comments of NYNEX at 40; Comments of GTE at 89-90. In general, these parties conclude that the Section 254(c) definition of "universal service" is limited exclusively to "telecommunications services."

CIX respectfully disagrees. Section 254(c) of the Communications Act specifically contemplates a broader definition of universal service for public and non-profit institutions. Section 254(c) defines universal service as an evolving level of both telecommunications and information services. Section 254(c)(1) articulates a *general* definition that "[u]niversal service is an evolving level of telecommunications services that the Commission shall establish . . . ." Thus, the Section 254(c)(1) "core" services are telecommunications services. Recommended Decision at ¶ 45. That general statutory definition, however, is then explicitly expanded by Section 254(c)(3), which states: "[i]n addition to the services included in the definition of universal service under paragraph (1), the Commission may designate *additional services* for such support mechanisms for schools, libraries, and health care providers for purposes of subsection (h)" (emphasis added). See also H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 133 (Subsection (c)(3) authorizes the Commission "to designate a separate definition of universal

service" for public institutions.) ("Conference Report"). Thus, while the "core" telecommunications services are a part of the statutory meaning of universal service, so are the "advanced services."

Significantly, the language defining universal service in subsection (c)(3) uses the broader term "services," and not the more narrowly defined term "telecommunications services." Subsection (c)(3) broadens the definition of universal service to include "advanced services" (designated by the Commission pursuant to 254(h)(2)), whether or not those services may also be information services or telecommunications services. We note that the Commission recently reached this same conclusion in interpreting the phrase "interLATA service" in Section 272.<sup>3</sup> While the Commission initially proposed that "interLATA service" was limited to telecommunications but not information services, the Commission reversed that tentative conclusion and found that "it is a more natural, common-sense reading of 'interLATA services' to interpret it to include both telecommunications services and information services." *Id.* at ¶ 56. The Commission also found that Congress deliberately used the term "telecommunications services" when it intended to exclude information services, and used the broader term "interLATA service" when Congress intended the Commission to adopt more than a telecommunications-specific interpretation. *Id.* In the same way, Congress' deliberate use of the broader term "services" in Section 254(c)(3), and not the more narrow term "telecommunications services," demonstrates that Congress did not limit Section (c)(3) services to telecommunications services.<sup>4</sup>

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<sup>3</sup> "In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272," First Report and Order and Further Notice of Proposed Rulemaking, CC Dkt. No. 96-149, FCC 96-489 (rel. Dec. 24, 1996).

<sup>4</sup> Similarly, claims that the statutory language "access to . . . information services" must imply a telecommunications service are wholly unconvincing. *See, e.g.*, Comments of SWB Communications at 44; Comments of Ameritech at 18. It is self-evident that Internet access is a

*(Footnote continued to next page)*



Moreover, the incumbent LECs' argument ignores that Section 254(h) provides the Commission with considerable rulemaking flexibility to define what are "advanced services." Section 254(h)(2) requires that the Commission "shall establish competitively neutral rules . . . to enhance . . . access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers, and libraries." 47 U.S.C. § 254(h)(2)(A). This statutory language simply does not restrict the Commission from designating information services as "advanced services." Rather, as explained by the Conference Report, subsection (h)(2) confers authority broadly in order that:

the Commission could determine that . . . information services that constitute universal service for classrooms and libraries shall include . . . the ability to obtain access to educational materials, research information, statistics, information on Government services, reports developed by Federal, State, and local governments, and information services which can be carried on the Internet.

Conference Report at 133. As a matter of statutory construction, such a delegation of particularized rulemaking authority "constitutes 'something more than the normal grant of authority permitting an agency to make ordinary rules and regulations' . . . and counsels exceptional deference" to the Commission.<sup>5</sup> Internet access services could be designated by the Commission as the type of "advanced service" uniquely suited to meet this mandate. *See*

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*(Footnote continued from previous page)*

service that provides access, in conjunction with underlying telecommunications services. The plain language of the statute, however, does not limit USF support to the telecommunications services. Moreover, the argument that access to telecommunications service is the only component to be supported by USF renders meaningless the statutory phrase "access to . . . information service," because any information service is offered in conjunction with telecommunications facilities. *C.f.*, Ziegler Coal Co. v. Kleppe, 536 F.2d 398, 406 (D.C. Cir. 1976) ("a statute should not be construed in such a way as to render certain provisions superfluous or insignificant").

<sup>5</sup> Fulani v. FCC, 49 F.3d 904, 909 (2d. Cir. 1995) (*citing* Chisholm v. FCC, 538 F.2d 349, 357 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976)). Measured against this extremely deferential standard, threats of litigation over this provision from a few commenters ring hollow.

Recommended Decision at ¶ 463 (Internet "access would enable schools and libraries to retrieve all free information available on world wide web sites.").

Thus, the incumbent LECs' focus on "telecommunications" versus "information" service misses the mark. The relevant inquiry is whether Internet access qualifies as an "advanced service" under Section 254(h)(2), not whether it is an information or telecommunications service. As the Joint Board found, since Internet access for schools and libraries would significantly contribute to "open[ing] new worlds of knowledge, learning and education to all Americans," Conference Report at 132, the Commission is within its statutory authority to designate Internet access service as an "advanced service" regardless of whether the ISP is a "telecommunications" provider.

2. *The Commission Can Promulgate Rules To Ensure That All "Advanced Service" Providers Receive Compensation for Discounts*

Some parties allege that Section 254(e) forbids non-telecommunications carriers, such as Internet access providers, from receiving universal service funds, and that therefore the Joint Board recommendation for participation by all competing Internet access providers is contrary to the statute. Comments of SBC Communications at 43; Comments of NYNEX at 40. They also claim that discounts are only permitted under Section 254(h)(1), and so the Commission cannot implement discounts in furtherance of subsection (h)(2). CIX respectfully submits that these arguments misconstrue the Commission's authority under Section 254.

First, the Commission is given broad rulemaking authority to promote "advanced services" for schools and libraries. Section 254(h)(2) mandates that the Commission "establish competitively neutral rules . . . to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services." This particularized rulemaking authority augments the Commission's existing authority to adopt rules which protect the public interest and carry out the provisions of the Communications Act. 47 U.S.C. §§ 154(i), 201(b), 303(r); NBC v. United States, 319 U.S. 190, 219 (1943) (FCC's

rulemaking authority is "expansive" and not limited); Fulani v. FCC, 49 F.3d at 909. Thus, the fact that subsection (h)(1)(B) provides for an explicit discount methodology does not in any way foreclose the Commission from concluding that such a methodology is also an appropriate way to implement subsection (h)(2) support mechanisms. Further, as a practical matter, a uniform discount methodology for all subsection (h) "advanced services" programs can significantly reduce administrative complexity.

In addition, Section 254(e) does not prohibit Commission rules allowing ISPs to obtain reimbursement for discounted services rendered to schools and libraries pursuant to subsection (h)(2). 47 U.S.C. § 254(e) ("only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support"). Section 254(e) establishes a straight-forward rule of parity: only eligible providers of Section 254(c)(1) "core" telecommunications services can recover some costs of providing those "core" services from the universal service fund. See Recommended Decision at ¶ 79 (only carriers that offer all designated "core" services can be eligible for USF support as Section 214(e) carriers). However, because the universal service fund is also intended to support the broader category of Section 254(h) "advanced" services,<sup>6</sup> the Section 214(e) carrier is not the only entity that can seek reimbursement for the provision of advanced services. *C.f.*, 47 U.S.C. § 254(h)(1)(B) ("[a]ll telecommunications carriers" shall provide subsection (c)(3) services, upon request, to schools and libraries); Comments of Winstar at 6 (Section 254(h) provider need not be an eligible Section 214(e) provider to receive universal service support). Finally, in the context of a highly competitive market such as Internet access, the rules cannot be "competitively neutral," as

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<sup>6</sup> Section 254(c)(3) states that the "Commission may designate additional services [pursuant to subsection (h)] *for such support mechanisms*." The emphasized statutory language demonstrates that Congress intended for subsection (h) "advanced services," including subsection (h)(2) services, to be supported by the universal service fund.

required by subsection (h)(2), without permitting all providers to compete for the schools' and libraries' business.

***B. Competitive Neutrality Requires That All Competitors Should Be Eligible to Provider Service to Schools and Libraries Under the Discount Program***

Ameritech, NYNEX, and other incumbent LECs assert that Internet access providers should not be eligible for compensated discounts to schools and libraries because they would not contribute directly to the universal service fund. Comments of Ameritech at 18; Comments of NYNEX at 40; Comments of BellSouth at 27. In their view, because ISPs would not contribute *directly* into the universal service fund, those providers should not be entitled to reimbursement from the fund.

As CIX explained in its initial comments, this argument is based on faulty analysis. To the extent that any ISP purchases underlying transmission facilities from a telecommunications carrier, the revenues from that transaction for telecommunications services increase the USF obligation of that carrier. Undoubtedly, the carrier would pass those increased governmental costs onto its customer -- in this case, the ISP. Thus, it is simply frivolous to claim that ISPs would not contribute to the fund; ISPs simply do not and should not pay directly into the fund. As significant end-users of telecommunications services, ISPs would already make significant contributions.<sup>7</sup> As Commissioner Chong pointed out, "[i]t is not the telecommunications carriers, but the users of telecommunications services to whom these costs will be passed through in a competitive marketplace." Recommended Decision, Separate Statement of FCC Commissioner Rachelle B. Chong at 14.

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<sup>7</sup> Similarly, to the extent that a telecommunications carrier is also an ISP, only the revenue from its provision of telecommunications services, and not Internet access service, would implicate a direct USF contribution. See Recommended Decision at ¶ 807 (carrier's contribution is "based on a carrier's gross telecommunications revenues net of payments to other carriers.").

More significant is the danger that schools and libraries which can afford Internet access only by using the federal discounts will have only one service choice -- the incumbent LEC with an affiliated Internet service -- or no provider at all. Schools and libraries are left much worse off, with less service flexibility and noncompetitive prices, under that scenario than if their market were open to competitive bidding by all. Moreover, by excluding all but the facilities-based ISP from eligibility in the discount program, many ISPs would be excluded from the market for schools and libraries. In implementing the "competitive neutrality" mandate, the Commission must be vigilant not to affirmatively harm the ISP market by adopting regulations which give facilities-based carriers a significant competitive advantage over non-facilities-based carriers in the schools and libraries market.

**II. If the Commission Provides Only Telecommunications Service Discounts, And Not Internet Access Service Discounts, It Must Still Ensure "Competitive Neutrality"**

As noted above, a significant concern of CIX in this proceeding is to ensure that the Commission adopt "advanced services" rules that are competitively neutral for the Internet access market. That market includes a plethora of providers that are non-facilities based as well as providers that own and use telecommunications facilities in conjunction with the provision of Internet access service. Included in this latter category are incumbent LECs, who maintain a monopoly hold on the "local loop " connecting the ISP to the ultimate end-user. Therefore, even if the Commission adopts discount rules for the telecommunications services (and not the Internet access services), a significant issue of "competitive neutrality" arises. Such a discount would likely obliterate ISP competition in the schools and libraries market because the incumbent LEC, in the course of selling the deeply discounted telecommunications service to the school or library, would also encourage the institution to accept its ISP service. In the face of the significant discount, the prospect of "one stop shopping" for all of its telecommunications and Internet access service needs, and the considerable pressure from the incumbent LEC's marketing personnel, the school or library would undoubtedly select the incumbent LEC for all of its

telecommunications needs. The discount program, then, would threaten to undermine current ISP competition in that market and, in so doing, would violate the statutory mandate for "competitive neutrality."

If the Commission adopts such a plan, CIX believes that the Commission should affirmatively provide for safeguards that ensure all ISPs are offered an opportunity to serve the library or school. CIX concurs with ITAA that the Commission should clarify that an incumbent LEC must unbundle its Internet access service from its basic telecommunications offering. Comments of ITAA at 4, *citing Computer II Final Decision*, 77 F.C.C. 2d 384, 475 (1980). Further, to make "one-stop shopping" competitive for the school or library, and allow independent ISPs a more feasible opportunity to compete, the independent ISP should be able to purchase billing and collection services from the incumbent LEC on fair and reasonable terms. In addition, the Commission should provide that, at the time of the initial marketing or service contact, the incumbent LEC must inform the school or library verbally and in writing that it may choose an independent ISP to provide its Internet access service, and that choosing another ISP will not in any way impair the availability of the telecommunications services or the discount. In this way, the discount program can better meet the statutory mandate for "competitive neutrality" in the ISP market.

**Conclusion**

As stated above and in its initial comments, CIX urges the Commission to adopt rules for "advanced services" to schools and libraries that are truly competitively neutral for all providers in the Internet access market.

Respectfully submitted,

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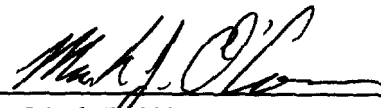
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